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# KENTUCKY LAW JOURNAL

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## COMMENT ON DECISIONS IN CRIMINAL CASES IN 1922.

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General regret is being expressed that crime and criminal trials are receiving so much publicity in the newspapers of the country. "The sensational alone, concerning the courts, finds a place in the popular press. It is within this compass that the American layman's knowledge of the administration of justice is limited and with these lurid stories is his sentiment flavored. The sacred truths and great principles that might be put within his reach are kept from the lay reader. . . ."

The writer believes that the knowledge, not only of the layman but also of the lawyer is sometimes deficient as to the whys and wherefores of criminal justice, and that the members of the bar occasionally need "brushing up" on our "sacred truths and great principles."

With such comment accepted as pertinent a study of the "general results" and some of the decisions our Court of Appeals may not be amiss. During the twelve months period ending in the Advance Sheets of December 17, 1922, the highest court of Kentucky decided one hundred and seventy-four cases of an exclusively criminal nature. Of these one hundred and sixty-three were cases in which the accused appealed, eleven being taken up by the Commonwealth. Of the former eighty-six were affirmed and seventy-seven reversed. Of the Commonwealth's appeals three certified the law and eight were affirmed. For a similar period ending in 1917 there were eighty-five cases of a criminal nature in which the Commonwealth was a party, in seventy-six of which the accused appealed. Results—fifty-seven affirmances and nineteen reversals. In the nine appeals by the Commonwealth there were five certifications of the law

and four affirmances. A similar period ending in 1916 furnished one hundred and three cases of a criminal nature where the Commonwealth was a party, eighty-four appeals being carried up by the accused. There were affirmances in forty-eight and reversals in thirty-six. The Commonwealth secured ten certifications of the law and nine affirmances.

There were thirty-six homicide cases decided in 1922, twenty-four affirmances and twelve reversals. Besides those were five cases where the charge was conspiring to murder. One of these was affirmed and four reversed. This latter method of "attack" by the Commonwealth seems to be popular but it is disastrous in the higher court if the evidence has been given a wide latitude before the conspiracy is in fact proved. There were sixty-nine liquor appeals, twenty-eight resulting in affirmances and forty-one in reversals. More will be said regarding these cases later.

From the above it will be readily seen that there were many more criminal appeals last year than in former years, if 1917 and 1918 may be taken as fair samples. Also, from the standpoint of efficiency, it is doubtful if we can say with Coue, "Day by day in every way we're getting better and better."

Having disposed of the "runs" we will now look to the "box score" for "errors." Admission of incompetent evidence was a controlling or partial reason for reversal in thirty-nine cases, improper instructions in twenty-one, defective indictment in fifteen, improper argument of the Commonwealth's Attorney in three, misconduct of this officer in two cases, bias of judge, surprise and former acquittal, one each.

The Commonwealth's Attorney must be careful to avoid having any error in the trial and while he might be induced to congratulate himself that "bad" indictments rank third in causes there is little consolation for him in this. It is true that the thirty-nine instances where error occurred through the admission of improper evidence made a bad showing. They go directly to the "fielding average" of the presiding judge, making the erroneous decision, yet in some of the cases, doubtless the "batting average" of the prosecutor is also affected in failing properly to make a "hit" in the manner in which he asks the question or in "stepping over the plate" in his mad effort to "hit the ball." The same may be said with even more emphasis

as to the instructions; altho, and we say it regretfully, the preparing of the instructions is too frequently left exclusively to the judge, counsel for accused offering one, excepting to its refusal and to all as given.

In discussing the cases herein the principles projected and the comments interpolated are persuasive only and the idea is to challenge the reader to investigate the adherence to or deviation from established precedents to the end that a more efficient and adequate administration of criminal justice may result. Altho the writer may be frank or inquisitive he wishes to emphasize that he has the greatest respect for our Honorable Court of Appeals and each and every member thereof.

"During the past year," says the Attorney-General, "the Court of Appeals has been flooded with cases involving convictions under the Prohibition Act." One reason for the great number was effort on part of "rich" bootleggers to avoid jail sentences, another was play for time, but probably the greatest was to break down the force of the new law by having some of its "teeth" extracted by means of the strong "forceps" of "unconstitutionality." It is cause for congratulation to the Attorney General's force and the prosecutors of the State, who worked jointly on the various sections of the Rash-Gullion Prohibition Act, that although many of the 1922 acts have been declared unconstitutional and therefore void, nevertheless the 1922 Prohibition legislation persists as valid and effective. *Lakes v. Goodloe*, 195 Ky. 240, 242 S. W. 632.

Our Criminal Code, Section 241, provides that a "conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence," etc. In spite of the fact that there are no accomplices in misdemeanors, our Court of Appeals in *Commonwealth v. Barton*, 153 Ky. 465, 156 S. W. 113, held that this section nevertheless applied in misdemeanor cases, following the Supreme Court of Arkansas, instead of our sister State of Tennessee, whose Supreme Court asserted that such a statute does not apply in a prosecution for misdemeanor as there are no accomplices in such cases. *Truss v. State*, 13 Lea (Tenn.) 311. Our Court this year in *Commonwealth v. Stringer*, 195 Ky. 716, 243 S. W. 944, followed the Barton case and as a result thereof, it is much more difficult to convict for violations of the liquor law than if the court had overruled the Barton

case and held that the literal language of Section 241 made this rule of evidence apply exclusively to felony cases.

An interesting case on venue is *Warman v. Commonwealth*, 193 Ky. 701, 237 S. W. 378. Heretofore our Court of Appeals has held that where the crime was proven to have been committed in a place to which the local public was invited and resorted for business, or other place of local prominence, it was presumably within the knowledge of the trial court and jury that such place was in the county charged in the indictment. While the court heretofore has helped us out by keeping us in, nevertheless the Warman case is evidently one beyond the "last straw" because the proof here was that the robbery was committed "at the home of Mrs. Vanover and that her home was a certain distance from other private residences." Hence apparently there is nothing from which the trial court and jury could have presumably within their knowledge that the crime was committed in the county charged. It would seem to be a righteous reversal.

Procedure in prosecutions against juvenile delinquents is a subject about which many lawyers, even prosecutors, are not fully advised. A most important decision is the case of *Compton v. Commonwealth*, 194 Ky. 429, 240 S. W. 36, which holds that the County Court has no jurisdiction to refer the case of a delinquent child charged with crime to the grand jury, without first giving notice to the parent, guardian or near relative. That this notice was given and that an order was properly entered referring the case to the grand jury by the Judge of the Juvenile Court, must affirmatively appear of record. Since this opinion was delivered it has been the custom of the writer hereof, to attach to and make a part of the indictment a certified copy of the notice and the officer's return thereon and the copy of the order from the Judge of the Juvenile Court referring the case to the Circuit Court.

A reversal that somewhat stuns is that of *Thomas v. Commonwealth*, 194 Ky. 491, 239 S. W. 976, on the ground that the lower court erred in admitting evidence of other crimes in a charge of uttering a forged instrument. The opinion states that the Commonwealth urged the admissibility of the evidence to establish the identity of the accused. The court attempts to apply a rule from Underhill on Criminal Evidence and be-

cause "there was nothing novel, unusual, or distinctive in the method or means employed to commit the crime charged, and the other crimes proved" the case is reversed.

Had the Commonwealth presented the proper rule and the proper reasons the conviction might have been affirmed. The case of *Barnes v. Commonwealth*, 101 Ky. 556, 41 S. W. 772, 19 Rep. 803, enunciates the proper rule. This case with many from other jurisdictions is cited by 16 C. J. 598, where the text says, "While in prosecutions for forgery and for the cognate offenses of possessing, uttering, passing, disposing, etc., of forged instruments, evidence of other crimes, where defendant is not connected with the act charged is not admissible, evidence of the connection of accused with other forged instruments is admissible, to show intent, guilty knowledge. . . . " Mr. Chamberlayne in his work on evidence, Sec. 3234, states: "In a prosecution for forgery or uttering forged paper, the guilty knowledge of the illegal nature of the paper can generally be proved, not by direct evidence only, but by acts and conduct of accused indicating such knowledge. *Commonwealth v. Russell*, 30 N. E. (Mass.) 763. To prove such guilty knowledge it is therefore proper to show other forgeries of the accused or that he had other forged instruments in his possession at about the time of the commission of the offense charged in the indictment," citing *Barnes v. Commonwealth* and many other cases. To the same effect is Roberson, Sec. 403. A most comprehensive note on this subject is found in 62 L. R. A., p. 193, *People v. Molineux* and especially at page 252, where it is shown that evidence of other crimes is admitted for the purpose of proving the *Scienter*. The Molineux case is quoted in the opinion, but as no citation is given to L. R. A. in the official report, the writer is of the opinion that the exhaustive note did not come to the attention of the Honorable Court. The Barnes case is not cited, quoted from or overruled.

A liquor case wherein there was a \$300.00 fine and sixty day sentence of imprisonment is reversed in *Keser v. Commonwealth*, 195 Ky. 809, 243 S. W. 1020. "In support of the motion for a new trial Keser filed his own affidavit, in which he set forth that he was taken by surprise by the evidence of Boggs," (the convicting witness). Keser's motion is sustained in spite of the fact that there is nothing in the opinion showing that Keser

asked that the swearing of the jury be set aside and the case postponed as required by *Lewis v. Commonwealth*, 190 Ky. 160, 227 S. W. 149, which says "otherwise alleged surprise in the testimony of a witness affords no ground for a new trial"—apparently whether the supporting grounds for new trial and affidavit setting out the facts were uncontradicted or not. This affidavit was uncontradicted. Was this overlooked by the Commonwealth's Attorney? and did Keser register seasonable and indispensable notice of his surprise immediately by making motion to discharge the jury and continue the case? are interesting questions. In the Lewis case "the claim of surprise was first made in the motion for a new trial, and this was too late." Did it make any difference whether Keser's affidavit was contradicted or not if Keser had not done as directed in the Lewis case?

Offenses which may be charged in one indictment are set out in Section 127 of the Criminal Code. "Where a statute makes two or more distinct acts committed with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, the different acts may be coupled in one count and it is not regarded as duplicity thus to join successive statutory phases of the same offense." (Joyce on Indictments, Sec. 399, citing *Commonwealth v. Hall*, 23 Penn. St. 104.) "And this rule is well settled (61a) and is supported by numerous other decisions (62). So an indictment which, in one count charges the crime of selling liquor on Sunday, and, in another, the crime of offering and exposing it for sale on Sunday, the description of the date, place, persons and goods sold or offered for sale, being identical in each count, is held not to charge two crimes, but different aspects of the single crime described by statute (63). Since it is a rule that such acts may be charged in a single count without rendering the indictment defective for duplicity it naturally follows that an indictment is not defective in which there is a joinder in different counts of such acts. (64)" Joyce on Indictments, Sec. 399.

61a. "It is a well settled rule of law that when a statute enunciates a series of acts, either of which separately or altogether may constitute the offense, all of such acts may be charged in a single count, for the reason that notwithstanding each act may by itself, constitute the offense, all of them together do no more, and likewise constitute but one and the same offense. *People v. Gusti*, 113 Cal. 177, 45 Pac.

263; *People v. Harrold*, 84 Cal. 568, 24 Pac. 106 *Flohr v. Territory*, 14 Okla. 477, 486, 78 Pac. 565."

62 California. *People v. Tyler*, 35 Cal. 553; *People v. Frank*, 28 Cal. 507; *People v. Shotwell*, 27 Cal. 94.

Massachusetts. *Commonwealth v. Coleman*, 184 Mass. 198, 68 N. E. 220.

New Jersey. *State v. Hill* (N. J. L. 1906), 62 Atl. 936.

New York. *People v. Harris*, 7 N. Y. Supp. 773.

Pennsylvania. *Commonwealth v. Soler*, 15 Pa. Super. Ct. 520.

63. *People v. Haren*, 35 Misc. 590, 72 N. Y. S. 205, N. Y. Laws 1896, c. 112, paragraph 31.

64. Iowa. *State v. Trusty*, 122 Iowa 82, 97 N. W. 989.

Missouri. *State v. Williams*, 191 Mo. 205, 90 S. W. 448.

Louisiana. *State v. Scott*, 48 La. Ann. 294, 19 So. 141.

New Hampshire. *State v. Lincoln*, 49 N. H. 464.

New York. *People v. Adler*, 140 N. Y. 331, 35 N. E. 644.

Pennsylvania. *Commonwealth v. Carson*, 166 Pa. St. 179, 30 Atl. 985.

Texas. *Flynn v. State* (Tex. Cr. 1904), 83 S. W. 206.

For years in this Commonwealth the practice of setting out all the statutory phases of the offense covered in a particular liquor statute had been the rule without any serious consequences, the Commonwealth usually formally electing or informally selecting one or the other of the phases upon which to try the accused. In such cases the other phases would be treated as surplusage or probably a formal election was made, and the court would strike out the other phases.

In considering the large number of liquor appeals, this year our Honorable Court of Appeals has seen fit to exercise a guarded jealousy for a singleness of charge in liquor prosecutions and has held many indictments bad for duplicity, (See *Walker v. Commonwealth*, 193 Ky. 426, 232 S. W. 617, and *Lovelace v. Commonwealth*, 193 Ky. 425, 236 S. W. 567; *Walker v. Commonwealth*, 193 Ky. 426, 232, S. W. 617; *Ash v. Commonwealth*, 193 Ky. 452, 236 S. W. 1032; *Mays & Terry v. Commonwealth*, 194 Ky. 540, 240 S. W. 58; *Collins v. Commonwealth*, 195 Ky. 745, 243 S. W. 1058; *Franklin v. Commonwealth*, 195 Ky. 816, 243 S. W. 1013; *Lyttle v. Commonwealth*, 195 Ky. 729, 243 S. W. 1037.

Under the rule as above set out by Joyce, backed up by citations from many jurisdictions of prestige, some of these indictments might not have been held duplicitous.



The reader is especially referred to:

*Raubold v. Com.*, 111 Ky. 433, 23 Rep. 735, 63 S. W. 781.

*Farris v. Com.*, 111 Ky. 236, 23 Rep. 580, 63 S. W. 615.

*Cockerell v. Com.*, 115 Ky. 296, 24 Rep. 2149, 73 S. W. 760.

*Dowdy v. Com.*, 31 Rep. 33, 101 S. W. 338.

*Jones v. Com.*, 104 Ky. 248, 20 Rep. 651, 47 S. W. 328.

All of which follow the rule laid down by Joyce and none of which is cited, quoted or overruled specifically in any of the above named cases holding indictments bad for duplicity.

Failure properly to negative the exceptions in the liquor statutes necessitated several reversals (*Rickman v. Com.*, 195 Ky. 715, 243 S. W. 929, and many others) and provoked the following:

"As prosecutions under this statute are becoming frequent, and many appeals are reaching this court involving the sufficiency of indictments, we hope we may be pardoned the suggestion to the attorneys for the Commonwealth and county, that in the preparation of indictments under the statute greater care be exercised, which, if done, will not only be a great saving in time to those officials and the courts before whom the cases are prosecuted, but this court also, and a great saving in expense to the Commonwealth." *Cook v. Com.*, 193 Ky. 417.

Shooting or cutting in sudden affray is prohibited by Section 1242 of the Kentucky Statutes. It takes care of the same offenses with misdemeanor punishment as Section 1166 for felony punishment with one important exception, however. This exception is well known. A note to the statute emphasizes it. This note is:

"Striking. This section does not embrace an offense committed by striking. *Erwin v. Com.*, 96 Ky. 422, 16 R. 602, 29 S. W. 340; *Riggs v. Com.*, 17 R. 1015, 33 S. W. 413; *McWilliams v. Com.*, 18 R. 92, 35 S. W. 538."

In *Mitchell v. Commonwealth*, 195 Ky. 819, 243 S. W. 1028, accused "was indicted in the Allen Circuit Court for a crime of malicious cutting and wounding another with intent to kill him but was found guilty of the lower offense of striking and wounding another in sudden heat of passion, or sudden affray, as provided in Section 1242, Kentucky Statutes, and his punishment fixed at a fine of \$500.00." This quotation is from the opinion affirming the lower court. Probably the record shows that the accused was found guilty below for the lower offense of cutting and wounding another instead of striking and wound-

ing another. The opinion of the court, however, refers to the offense twice afterwards and says, "conviction of the lower offense of striking and wounding in sudden heat of passion."

If this correctly states the offense of which the accused was found guilty an explanation is due from some source and it is astonishing that this feature was not emphasized in the motion and grounds for new trial.

The writer hereof has not had the opportunity to consult the records in this case, but it looks like the judge writing the opinion, and all of his associates (there is no dissenting opinion) "slipped a cog" and made a mistake in the Mitchell case and possibly the judge writing the Cook opinion was present at the time the Mitchell opinion was delivered. "Mistakes will happen in the best of families."

Possibly no case decided by our Court of Appeals in recent years has provoked more discussion than the case of *Youman v. Commonwealth* (decided October 5, 1920), 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303. The Attorney General of Kentucky recently stated that "the Court of Appeals very properly held that evidence secured as a result of a search made without a legal search warrant is not competent and cannot be introduced for any purpose over the objection of the defendant made at the time the evidence is offered."

A young lawyer was very earnestly pleading to establish a point before the Supreme Court of the United States. While he was yet in the full course of his argument one of the Justices leaned over the bench and interjected crisply: "But that is not the law." The young lawyer was abashed, but only for a moment before he retorted, "It was the law until the court spoke."

Until the *Youman* opinion was rendered articles obtained by unlawful search were admissible, as authorities quoted later, show.

The press throughout the State has lamented the rendering of the *Youman* decision and has contended that the efficient prosecution of violations of the prohibition law has thereby been severely handicapped.

Major John H. Wigmore, Dean of the Law School of Northwestern University, author of *Wigmore on Evidence*, and an acknowledged authority on the subject says that the reasoning of the *Youman* case is:

"Misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, a court appears indifferent to what is the direct and immediate result, viz., of making justice inefficient, and of coddling the criminal classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzeler or panderer."

He insists that while the officer violating the sanctity of the castle of the moonshiner or bootlegger is subject to punishment under our constitutions and laws, the evidence procured should be admitted against the liquor violator instead of exempting both the bootlegger and the offending officer from prosecution, as is the usual result.

In a recent article in the American Law Journal, Prof. Wigmore cites many authorities and treats this subject of evidence exhaustively. In the Youman case, as a constitutional question was involved, we presume the whole court sat, although the official report seems to be silent as to specific mention of it. There is, however, no dissenting opinion. During the past year the Youman case has been followed in *Craft v. Commonwealth*, 196 Ky. 277, 244 S. W. 681; *Cline v. Commonwealth*, 196 Ky. 806; *Collie & Crawford v. Commonwealth*, 195 Ky. 706, 243 S. W. 913; *Helton v. Commonwealth*, 195 Ky. 678, 243 S. W. 878; *Price v. Commonwealth*, 195 Ky. 711, 243 S. W. 927; *Ash v. Commonwealth*, 193 Ky. 452, 236 S. W. 1032.

In citing the Ash case, Major Wigmore says: "The heroic vow of the French at Verdun, 'They shall not pass!' is sentimentally dragged in to protect petty lawbreakers."

There was no dissenting opinion filed in any of said cases citing and approving the Youman doctrine.

Looking into the question of admissibility in evidence against the accused, of articles obtained by search without a search warrant, the writer in December, 1920, while investigating the soundness or the unsoundness of the Youman case, reached the conclusion that the decision was unsound, after a careful search of the authorities.

#### CITATIONS

- Chamberlayne's Mod. Evidence, Sec. 1740e, p. 2299.
- Clark's Criminal Procedure (1918), Sec. 219, p. 633.
- 16 Corpus Juris, Sec. 1098, p. 567.
- 35 Cyc., pp. 271-2.
- 59 L. R. A. 465, Case & Note.

- 8 L. R. A. (N. S.) 762, Case & Note.  
 L. R. A. 1916E, 714, Case & Note.  
 L. R. A. 1915B, 834, Case & Note.  
 34 L. R. A. (N. S.) 58, Case & Note.  
 14 Cent. Dig. Crim. Law, Secs. 875-877.  
 6 Dec. Dig. '06. pp. 481-2, Cr. Law, K. N. 395  
 7 2d. Dec. Dig., pp. 516-7, Cr. Law, K. N. 395.

## TEXT

PROBATIVE RELEVANCY—CANONS OF RELAXATION—DIRECT AND CIRCUMSTANTIAL EVIDENCE—*Illegality*. Administrative necessity for the securing of proof of essential facts in the only way practically available may go so far as to permit the use of deceit, dissimulation, fraud, or even grave illegality for the purpose of obtaining testimony. *People v. Bunkers* (Cal. App. 1905), 84 Pac. 364 (bribery of state senator). (Rehearing denied (Sup. 1906), 84 Pac. 370), Chamberlayne's Modern Evidence Sec. 1740e, p. 2299.

## EVIDENCE WRONGFULLY OBTAINED

219. The fact that articles or admissions were wrongfully obtained from the defendant does not render them inadmissible in evidence.

As we have already seen, confessions obtained from the defendant, if otherwise competent, are not rendered inadmissible because they were obtained from him by deception, or while he was drunk, or under a promise of secrecy. Nor are articles, if otherwise admissible in evidence, rendered inadmissible because they were wrongfully taken from him, as by an unlawful search or seizure. *State v. Nordstrom*, 7 Wash, 506, 35 Pac. 382; *Com. v. Brelsford*, 161 Mass. 61, 36 N. E. 677; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep 877; *Id.*, 41 S. C. 551, 19 S. E. 691; *State v. Flynn*, 36 N. H. 64. Contra, where the evidence was obtained in such a manner as to amount to compelling the witness to incriminate himself. *Underwood v. State*, 13 Ga. App. 206, 78 S. E. 1103; Clark's Criminal Procedure (1918), Sec. 219, p. 633.

CRIMINAL LAW—EVIDENCE—COMPETENCY—COMPELLING ACCUSED TO CRIMINATE HIMSELF—ARTICLES TAKEN FROM ACCUSED.—The constitutional guaranty is not violated by the admission of incriminating evidence taken from the person of accused on a search thereof, when he was under legal arrest, or when the

search and seizure were legal, and even where he was under illegal arrest, and the search of his person was illegal and unauthorized; and the same is true of discoveries made during an unlawful search of the premises of accused. *Gillespie v. State*, 18 Ga. A. 612, 39 S. E. 1088; *Minnor v. Atlanta*, 7 Ga. A. 817, 68 S. E. 314; *State v. Flynn*, 36 N. H. 64; 16 Corpus Juris, Section 1098, p. 567.

SEARCHES AND SEIZURES—CONSTITUTIONAL LIMITATION UPON STATE POWERS—PROCURING EVIDENCE OF CRIMINALITY.—It is well settled that a person legally arrested and in the custody of the law on a criminal charge may be subjected to a personal search and examination, even though against his will, for evidence of his criminality, and, if found, it may be seized without violating his constitutional rights. And if any person, even by an illegal search or seizure, procure possession of any article, instrument, or document, the state may, notwithstanding such illegal seizure, use it if necessary as legitimate evidence against the person from whom it was so obtained to convict him of a crime (62), or upon an investigation against such person before a grand jury, it being an established rule that the court can take no notice of how such evidence was obtained, whether originating from a legal or an illegal source (64).

62. Citing cases from Ala., Cal., Col., Ga., La., Mass., N. Y., W. Va., N. C.

64. *Imboden v. People*, 40 Colo. 142, 90 Pac. 608; *Com. v. Dana*, 2 Metc. (Mass.) 329; *State v. Strait*, 94 Minn. 384, 102 N. W. 913; *Lucchesi v. Com.* (Va.), 94 S. E. 925 (cited P. 1668, 1920 Cyc Ann).

35 Cyc., pp. 1271-2.

#### ANNOTATION

*State v. Edwards*, 51 W. Va. 220, 59 L. R. A. 465, and note, especially at p. 472, where *Boyd* case cited in *Youman v. Com.*, 189 Ky. 152, 224 S. W. 860, is distinguished and explained.

Articles which are or may be used in unlawful traffic are admissible in evidence against one in whose possession they are found, however obtained by the state, even if produced by an unauthorized and illegal search. *State v. Burroughs*, 72 Me. 479; *Com. v. Henderson*, 140 Mass. 303, 5 N. E. 832.

And in such case the admissibility in evidence against the accused of such articles found upon his premises is unaffected

by any inquiry as to whether the proceedings of the officer serving the search warrant were regular and lawful or not. *Com. v. Henderson*, 140 Mass. 303, 5 N. E. 832. And see other cases therein cited and quoted.

*State v. Fuller*, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762, where Boyd case is harmonized with other authorities.

Mr. Wigmore (Wigmore, Ev. 2263) says that it is not merely compulsion that is the kernel of the privilege against incriminating one's self, but "testimonial compulsion." Applying the criterion thus suggested to the production or inspection of documents and chattels, he says in effect (2264) that the defendant is protected by his constitutional privilege against the production by any form of "process treating him as a witness," e. g., a subpoena or order to produce; and, upon the other hand, that documents or chattels obtained without the use of process against defendant as a witness are not within the scope of his privilege, and may be used evidentially. Apparently the same position was taken in *Duren v. Thomasville*, 125 Ga. 1, 53 S. E. 814, where the court said: "The criterion is, who furnished or produced the evidence? If the person suspected is made to produce the incriminating evidence, it is inadmissible. *Evans v. State*, 106 Ga. 519, 71 Am. St. Rep. 276, 32 S. E. 659. But, if this person or belongings are searched by another, although without a vestige of authority, the evidence thus discovered may be used against him."

In *State v. Krinski*, 78 Vt. 162, 62 Atl. 37, it was held that articles found in the building of defendant charged with keeping intoxicating liquor for sale without a license, and testimony relating thereto, were admissible without regard to the legality of the search warrant under which they were seized. The court said that there was a plain distinction between seizure and production of papers which are not the basis of the charge, and are merely of an evidentiary character, and the seizure and production of property kept for an illegal use. To the same effect is *State v. Switer*, 78 Vt. 391, 63 Atl. 182.

And many other citations are given to cases where the evidence was admitted notwithstanding the illegality of the method by which it was obtained, the seizure being made without color of authority, or at least without a formal search warrant.

*People v. Campbell*, 160 Mich. 108, 125 N. W. 42, 34 L. R. A. (N. S.) 58, from note we quote:

"So where officers, either with or without a warrant, go to a place of business and compel the proprietor against his protest to allow them to enter and search an adjacent back room, where they find hidden a quantity of intoxicating liquors, the evidence thus obtained is admissible in a prosecution against such proprietor for a violation of a municipal ordinance prohibiting the keeping on hand of intoxicating liquors for the purpose of unlawful sale, and the use of such evidence is not a violation of either the unlawful search and seizure clause of the Constitution, or a provision that no man shall be compelled to furnish testimony upon which to convict himself. *Minor v. Atlanta*, 7 Ga. App. 817, 68 S. E. 314."

The cases decided since the time of the note in 8 L. R. A. (N. S.) 762, seem to be in accord with the well settled doctrine that the admissibility in evidence against a defendant of documents and articles belonging to him is not affected by the fact that they were illegally taken from his possession, or otherwise unlawfully obtained; and even if documents or articles are taken from a defendant under such circumstances that their admission in evidence against him would be compelling him to testify against himself, only the constitutional privilege against self-crimination will, if relied upon, exclude them, and they are not inadmissible merely on account of the illegality in obtaining them.

See other cases cited.

*Weeks v. U. S.*, 232 U. S. 383, 52 L. Ed. 34 Sup. Ct. Rep. 341 L. R. A. 1915B 834.

The case of *Weeks v. United States*, it will be noted, is not necessarily opposed to any of the above decisions, as the United States Supreme Court expressly states that this is not the case of testimony offered at a trial, where the court is asked to stop and consider the illegal means by which proofs otherwise competent were obtained; but in this case the defendant had made a seasonable application, before trial, for the return to him of letters and private documents seized in his house in violation of his constitutional rights, and it was held that the court below should have restored these papers to the accused; that its refusal of his application for their return involved a denial of his constitutional rights and that, in holding them and permitting their use upon the trial, it committed the prejudicial error. p. 836.

The recent cases are in accord with the rule announced in the earlier notes on the question, to the effect that mere illegality in the taking of documents or articles from one charged with a crime does not render such documents or articles inadmissible in evidence against him, unless they were taken from him under such circumstances that their admission would violate his constitutional right not to be required to furnish evidence against himself. Thus, on a prosecution for keeping cocaine with intent to sell it, a bottle of cocaine found on the defendant's person is admissible in evidence against him, notwithstanding it was obtained by an unlawful search of his person, and by force or threat of shooting. *State v. Sutter*, 71 W. Va. 371, 43 L. R. A. (N. S.) 399, 76 S. E. 811, and other cases therein quoted.

*Blacksburg v. Beam*, — S. C. —, 88 S. E. 441, L. R. A. 1916E 714, from note we quote:

"The cases cited in this note are in accord with the rule announced in the earlier notes, that mere illegality in the taking of documents or articles from one charged with a crime does not render them inadmissible in evidence against him, unless taken under such circumstances that their admission would violate his constitutional right not to be required to furnish evidence against himself."

Thus, evidence as to the running of a "blind tiger" obtained by an illegal entry of premises, is admissible. *Shreveport v. Knowles* (1915), 136 La. 770, 67 So. 824.

### DIGEST

CRIMINAL LAW—EVIDENCE—MATERIALITY AND COMPETENCY IN GENERAL—ARTICLES WRONGFULLY TAKEN FROM ACCUSED.—See 14 Cent. Dig. Crim. Law, Secs. 875-877.

The following digest paragraphs are the liquor cases taken from 6 Dec. Dig. '06, pp. 481-2, Criminal Law, K. N. 395:

395. Articles wrongfully taken from accused. (Kan. 1901). The fact that bottles, glasses, liquors and other articles may have been taken by an officer from the possession of defendant in an unauthorized search of his premises does not constitute a valid objection to the admissibility of such articles in evidence against him in a prosecution for unlawfully selling intoxicating liquors, if they are otherwise pertinent and competent. *State v. Miller*, 64 P. 1033, 63 Kan. 62; *Same v. Everson*, 64 P. 1034, 63 Kan. 66.

(Kan. 1905). On a prosecution for unlawful sale of liquor, bottles of liquor seized by an officer from defendants' possession are admissible in evidence, though seized without a warrant. *State v. Schmidt*, 80 P. 948, 71 Kan. 862.



(Kan. App. 1899). The jugs, bottles, and vessels supposed to contain intoxicating liquors procured by an officer making the arrest in a liquor case at defendant's place of business are competent evidence upon the trial, together with the labels printed and written matter thereon. *State v. Stockman*, 58 P. 1032, 9 Kan. App. 422.

(Vt. 1905). On a prosecution for keeping for sale intoxicating liquors without a license, it was proper to admit in evidence liquors which had been seized, irrespective of the legality of the warrant. *State v. Krinski*, 62 A. 37, 78 Vt. 162.

(Vt. 1906). In a prosecution for keeping liquor for sale contrary to law, a faucet, rubber hose, and liquor found upon defendant's premises by police officers, as well as the testimony of the officers who found the articles, were properly admitted in evidence without regard to whether the search made by the officers was legal or not. *State v. Suitor*, 63 A. 182, 78 Vt. 391.

The following digest paragraphs are the liquor cases taken from 7 2nd Dec. Dig., pp. 516-7, Criminal Law, K. N. 395:

(Ga. App. 1915). Whiskey obtained by an officer by unlawful search and seizure held not inadmissible, under Const. art. 1, parag. 1, pars. 6, 18. *McAlister v. State*, 86 S. E. 412, 17 Ga. App. 159.

(Mich. 1911). Act No. 107, Pub. Acts 1909, relating to searches for and seizures of intoxicating liquors, was enacted for the procuring of evidence, and hence, in a prosecution for the violation of the liquor law, liquors, implements, furniture, etc. found by the officer and produced by him at the trial together with his testimony as to when and where he found them were admissible, and it was immaterial whether the search and seizure proceedings were regular and valid or not. *People v. Aldorfer*, 130 N. W. 351, 164 Mich. 676.

(Neb. 1912). In a prosecution for illegal sale of liquor, receiving in evidence the federal liquor license issued to defendant was not error on the ground that it was obtained from him by stealth. *Nixon v. State*, 138 N. W. 136, 92 Neb. 115.

(S. D. 1909). Intoxicating liquors found in defendant's dwelling house pursuant to an illegal search and seizure were nevertheless admissible in evidence against him in a prosecution for selling liquor without a license. *State v. Madison*, 122 N. W. 647, 23 S. D. 534.

(Ga. App. 1907). Where in a prosecution for the illegal sale of intoxicating liquors it appeared that a bottle of whiskey was forcibly taken from accused, such bottle was inadmissible in evidence against him unless he was legally arrested and the whiskey was found at his residence or place of business. *Smith v. State*, 59 S. E. 934, 3 Ga. App. 326.

One who sees another sell whiskey in his presence may arrest the seller without a warrant and seize the whiskey to use it in evidence; it being only when accused is illegally arrested that incriminating evidence taken from him is admissible. *Id.*